

USAWC STRATEGY RESEARCH PROJECT

**POSSE COMITATUS, THE ARMY, AND HOMELAND SECURITY:  
WHAT IS THE PROPER BALANCE?**

by

Colonel Deborah L. Geiger  
United States Army

Colonel Christine Stark  
Project Adviser

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CARLISLE BARRACKS, PENNSYLVANIA 17013

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## ABSTRACT

AUTHOR: Colonel Deborah L. Geiger

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Within a few months of the September 11<sup>th</sup> terrorist attacks upon our nation, the Office of Homeland Security was created and, ultimately, a *National Strategy for Homeland Security* was written. In *The National Security Strategy* of 2002, President Bush formalized the protection of the homeland as the military's highest priority mission. Protecting the homeland often requires military capabilities to manage crises and mitigate the consequences of an attack or natural disaster. The United States National Security Strategy addresses the complexities and challenges our military faces in its role securing the homeland. The two viable options that will be explored in this paper are the status quo, which can be maintained with respect to the Army's role in homeland security—with its attendant risks—or revisions can be made to the Posse Comitatus Act and the Army's force structure in order to deal more effectively with an increased role in domestic emergencies. This paper will document the historical background and legal parameters of the PCA along with its impact on Army domestic operations, and offer realistic recommendations for modifying the Act and changing Army force structure to help achieve part of the overall vision set forth in the National Security Strategy.



## POSSE COMITATUS, THE ARMY, AND HOMELAND SECURITY: WHAT IS THE PROPER BALANCE?

Within a few months of the September 11<sup>th</sup> terrorist attacks upon our nation, the Office of Homeland Security was created and, ultimately, a *National Strategy for Homeland Security* was written. In *The National Security Strategy* (NSS) of 2002,<sup>1</sup> President Bush formalized the protection of the homeland as the military's highest priority mission. The *Quadrennial Defense Review* (QDR) of 2001<sup>2</sup> had already emphasized the military's responsibility in supporting civil authorities in the event of natural and man-made disasters. The *National Military Strategy* (NMS) of the United States of America 2004<sup>3</sup> reinforced the NSS by establishing homeland security as the most important priority of the military today. The NSS, NMS, and the *National Strategy for Homeland Security*<sup>4</sup> provide general strategic guidance for the employment of forces outside and within the United States.

This National Homeland Security Strategy is the keystone to achieving the unity of effort necessary to succeed on this battlefield. It must coherently integrate the ends, ways, and means of the Federal, state, and local levels to enable the effective use of all available resources, at all levels of government, toward a common purpose: the security of America and its citizenry.<sup>5</sup>

Prior to the terrorist attacks of September 11, the United States' National Security threats clearly belonged to the military, and domestic security threats were the domain of civilian law enforcement at the federal, state, and local levels. In the post-9/11 world, however, the formerly clear-cut divisions in authority and boundaries no longer exist between war and many criminal attacks.

If the highest DOD priority is defense of American national territory, this mission must receive the level of attention it merits. Evolving national strategy for homeland security requires that DOD consider the employment of military forces in ways previously considered outside the scope of operations.<sup>6</sup>

This new scope of operations requires a thorough review of the legal limitations, specifically the Posse Comitatus Act (PCA)<sup>7</sup>, which is imposed upon the military when conducting domestic-type operations. The blending of law enforcement and military strategies toward a common purpose and response effort in supporting national objectives must occur if there is to be a coordinated and effective governmental response strategy. In executing this strategy, the primary challenge is a proper balance between the Army's response to civilian law enforcement in protecting the homeland while ensuring civil liberties are preserved for American citizens. In addressing this challenge, it is essential to consider whether or not the Army's law enforcement role in domestic disaster relief (natural/man-made) should be expanded beyond the restrictions

imposed by the PCA, and whether or not the Army should transform to better respond to homeland security needs. At the center of the debate over these prospective changes are both the legal restrictions imposed under the PCA, and the Army's structure, particularly in regard to the practice of employing forces domestically in order to protect the homeland.

In April 2002, President Bush approved the Defense Department Unified Command Plan which established U.S. Northern Command (NORTHCOM)<sup>8</sup> with the intent to merge command and effort within a single operational organization in order to streamline DOD support to civil authorities and other agencies. In 2003, NORTHCOM developed initial operational capabilities with a continuing goal to enhance civil-military integration for homeland security with particular emphasis on the areas of planning, operations, and response capabilities. As a newly created combatant command, NORTHCOM coordinates military assistance to various civilian authorities as part of their overall mission. For instance, in the category of civil support, the Department of Defense (DOD) may be involved in emergencies such as responding to an attack, assistance to law enforcement, disaster relief, civil disturbances, other catastrophic events, and/or continuity of government.

#### Background of the Posse Comitatus Act

The Posse Comitatus Act is one of the embodiments of an American tradition against military involvement in civilian affairs. At the end of the French and Indian War, England kept a standing Army in the colonies of about 6,000 troops. London's stated intent was that the Soldiers were needed to defend against Indian aggression. The colonists had their own militias, and they were suspicious of the purpose and ulterior motives of a foreign force living and moving in their midst. Adding to the colonist's discontent, England passed the Quartering Act of 1765 which required the colonists to provide housing for these "foreign" British Soldiers stationed in their colonies. "The Declaration of Independence listed among our grievances against Great Britain that the King had kept among us, in times of peace, Standing Armies without the consent of our legislatures, had affected to render the Military independent of and superior to the civil power."<sup>9</sup> In the Constitution, our Founding Fathers, in order to guarantee democracy, directed civilian control of the military through the government system. Additionally, the Bill of Rights restricted the quartering of troops in private homes.

Despite the expulsion of the British Army after the Revolution and the subsequent legal protections enacted in the fledgling American democracy, the federalized Army's role in civilian matters remained significant. For instance, even within the constitutional safeguards, the regular American Army was continually called to assist U.S. Marshals and local sheriffs. "In

1854, Caleb Cushing, attorney general for President Franklin Pierce, blessed the posse comitatus doctrine and opined that marshals could summon a posse comitatus and that both militia and regulars in organized bodies could be members of such a posse."<sup>10</sup> Attorney General Caleb Cushing authorized the employment of both the militia and regulars primarily to enforce the Fugitive Slave Act of 1850 and also to serve as a police force in the turbulent western frontiers. Under the Cushing Doctrine, Armed Forces under the command of their officers were called into duty by U.S. Marshals or local sheriffs. The Fugitive Slave Act, enabled the U.S. Marshals to call upon the Army to execute warrants for the arrest of slaves that escaped and crossed into another state's jurisdiction. "The Fugitive Slave Law, in brief caused enormous mischief, gave antislavery feelings and abolitionism a tremendous boost in the North, but was totally ineffective in halting the continued fleeing of slaves from the South."<sup>11</sup> Along the western frontier, Fort Commanders were often the only authority in place, and would therefore be called upon to exercise law enforcement responsibilities in support of the local settlement populations' safety and security. Often, Fort Commanders exercised this law enforcement responsibility inconsistently toward alleged criminals or Indians that appeared to threaten settlers. "The results were sometimes violations of the Constitution and conditions otherwise untenable to elected officials."<sup>12</sup>

Not only were federal troops used to enforce the Fugitive Slave Act and provide security for settlers moving in the western frontier, federal troops were used extensively in the post-Civil War period.

Under the Reconstruction Acts the district commanders had to cope with such matters as horse stealing, moonshining, rioting, civil court proceedings, regulating commercial law, public education, fraud, removing public officials, registering voters, holding elections, and the approving of new state constitutions by registered voters.<sup>13</sup>

The Army introduced a strong military presence in the South which performed law enforcement functions as well as political functions.

Before the Civil War, the militia under state control was used to control local disorders throughout the United States, but during Reconstruction, there was no effective militia in the defeated states, so the Army protected the people (especially the newly emancipated slaves) and dealt with disturbances.<sup>14</sup>

The violence between white Americans toward African Americans with the anticipation of future violence directly contributed to the positioning of the Army in the South. Ironically, the Army's involvement in political tasks, rather than law enforcement tasks, caused the most contempt amongst the citizens, the government, and Congress. Federal troops were stationed at political

events and polling places during the contested presidential election of 1876. Republican candidate Rutherford Hayes defeated Democratic candidate Samuel Tilden by one electoral vote. "In the election of 1876, Democrats attacked Republicans for forcing blacks to vote the Republican ticket."<sup>15</sup>

To all U.S. Marshalls: You are hereby placed in command of all the Military Forces in the United States-militia, soldiers and marines-for use at the November elections. You may also appoint all (Republican) citizens your deputies for the same occasions. These instructions have been submitted to the President, and have his approval, Alphonso Taft, Attorney General, Washington, Sept 4, 1876.<sup>16</sup>

President Grant's decision to allow troops to be used in the states of South Carolina, Louisiana, and Florida as the posse comitatus at polling places is credited for the Republican Party victory. The use of the military for a political purpose was widely viewed by the southern states as a barrier to freedom, an injustice, and repressive of democracy.

A "trinitarian" relationship between the government, the people, and the military existed in harmony to prevent abuses in the Army operating under U.S. Marshals or local officials. The Posse Comitatus Act was enacted in 1878 to prevent the Army from being abused by having its soldiers pressed into service as police officers (a posse) by local law enforcement officials in the post-Reconstruction South.<sup>17</sup> The catalyst for change in the enacting of the PCA was the positioning of federal troops at political events and polling places under the guise of maintaining domestic law and order. "The misuse of military in our election—the most central event to a democracy—led Congress to enact the PCA in 1878."<sup>18</sup> It is ironic that the PCA embodies the tradition of separating civilian and military authority (Army/Air Force) in law enforcement when the central reason for its passage dealt with the military's involvement in political functions especially during the post-Reconstruction South. Since the Civil War, and more recently in the past 20 years, several laws have been enacted which grant specific exceptions to the PCA. The military has become the means to address policy and domestic security issues by the more recent erosions of the PCA through Congressional legislation and Executive policy. These main exceptions include disaster relief; insurrection; the war on drugs and terrorism; the protection against weapons of mass destruction; and the protection of our nuclear materials. Most recently, because of the catastrophic destruction of Hurricane Katrina and the demonstrated need for immediate assistance, a renewed debate concerning the legal application and restrictions under the PCA exists.



### Legal Application of the Posse Comitatus Act

The PCA is a restrictive statute that does not apply to all military members, has many statutory exceptions, and is complex to interpret. Without approval of Congress or Constitutional authority, direct and active federalized military involvement with civilian law enforcement to enforce the laws in the United States is restricted under the PCA. The PCA is a criminal statute which carries a fine up to \$10,000 and/or two year imprisonment. To date, however, no one has been prosecuted under the PCA. In addition to fines and imprisonment, courts may suppress evidence that is illegally obtained under PCA which could allow a subject to go free. The main direct prohibitions include an arrest; search and seizure; interdiction of vessels, aircraft, or vehicles; surveillance; stop and frisk; or any other active civilian law enforcement activity. When directly interpreted, the statute pertains only to active-duty Army and Air Force members. Department of Defense Policy 5525.5 extended the same prohibitions of the PCA to the U.S. Navy and the Marine Corps.

### Exceptions to Posse Comitatus

The listed exceptions below are not all-encompassing, but highlight the main exceptions when the military is authorized to provide assistance to civilian law enforcement authorities without violating the PCA. These exceptions to the PCA include: military purpose doctrine; riot, insurrection or lawlessness; emergency authority; disaster relief; drug interdiction; emergency situations involving chemical or biological weapons of mass destruction.

These statutes permit direct military participation in civilian law enforcement, subject to applicable limitations within the respective statutes. Specific statutes and other reference must be consulted before determining military participation is permissible.<sup>19</sup>

The Coast Guard and the National Guard are the only services that the PCA provides broad exceptions to its prohibitions. The Coast Guard, in its normal capacity, enforces maritime law and provides border control, and the PCA does not apply. When State National Guard units operate under the authority of the Governor and State control, they are exempt from the restrictions of PCA. This is not the case when the National Guard is federally activated or when the Coast Guard is transferred from the Department of Homeland Security to DOD. In these cases, they are subject to the restrictions under the PCA. For instance, if a State Governor declares a state of emergency because of natural disasters such as earthquakes, hurricanes, forest fires, floods, etc., the limitations under the PCA do not apply. However, if a federal emergency is declared and those same units which were activated are then federalized, the unit personnel are now restricted under the PCA. Another exception where the PCA does not apply

is in the off-duty conduct of military personnel acting as private citizens, unless the individual is required or ordered by an official military officer to perform an active law enforcement function. The PCA is used only in the United States; however, DODD 5525.5 extends the application of PCA to overseas jurisdictions.

### Restrictions

The main restrictions of the PCA are framed in 10 U.S.C Sections 371-381 and are broken down into three major areas. These major categories of restrictions include: the use of information; the use of military equipment and facilities; and the use of military personnel. The use of military personnel is further separated into three tests to determine compliance of the PCA. "DODD 5525.5 further divides the restrictions on the use of DOD *personnel* in civilian law enforcement activities into categories of direct assistance, training, expert advice, operation or maintenance of equipment, and other permissible assistance."<sup>20</sup> Criminal information sharing typically occurs between military and civilian law enforcement entities. The main restrictions on information sharing include intelligence gathering from DOD intelligence assets. "...DOD service regulations implementing Executive Order 12333 prohibit military intelligence personnel from collecting, retaining, or disseminating information about the domestic activities of U.S. citizens, resident aliens, or domestic associations or corporations."<sup>21</sup> If, however, violations of local and state law occur during the normal course of military training or operations, service members are encouraged to report that information to civilian law enforcement authorities.

Title 10, Section 372 allows the military to loan equipment and provide facilities for local law enforcement, provided that the assistance does not negatively impact military readiness. When providing these assets to civilian authorities, cost reimbursement, and proper authorization is often required. "Approval authority under DODD 5525.5 varies based on the type of equipment requested, the reason for the request, and whether the equipment will be loaned or leased."<sup>22</sup> In the early 1990's, with the expanded military role in the war on drugs, Congress enacted statutes that expanded DOD's ability to provide equipment to better control the passage of illegal drugs into the United States. These statutes increased the military's authority to provide equipment and facilities as well as allow participation of DOD personnel in civilian law enforcement as long as a violation of the "three tests" does not exist.

"The first test is whether the action of the military personnel is 'active' or 'passive'."<sup>23</sup> Examples of active participation would be restriction of civilian movement through the use of

checkpoints, gathering evidence, arrest or detention of criminal suspects, and use of military personnel as undercover agents, investigators, or interrogators. A violation of the PCA is more likely to exist if the military members' actions closely resemble the actions of the civilian police officer or as the military member's participation increases. "Passive participation is exemplified by the military's conduct of area surveillance or providing training."<sup>24</sup> Other examples include the use of military equipment and facilities. "The second test is whether use of the armed forces pervades the activities of civilian law enforcement officials."<sup>25</sup> In this instance, military members are prohibited from engaging directly in the performance of a civilian investigation. "To be a violation of the PCA under this test, military personnel must fully subsume the role of civilian law enforcement officials."<sup>26</sup> "The final analysis is whether military personnel subject citizens to the exercise of military power that is regulatory, proscriptive, or compulsory (a power compulsory in nature is one that exerts some coercive force)."<sup>27</sup> Examples might include arresting civilians or exerting authority over civilian law enforcement in the conduct of a joint investigation where the civilian agency has primary jurisdiction. Many legal statutes exist as exceptions to the PCA which allow the President or Congress to broaden federalized military involvement in civilian affairs.

#### Application of the PCA

##### Civil Disturbance

The 1992 Los Angeles Riots provide a domestic case study in applying the PCA. The relationship of the National Guard in its state and federal status is further illustrated here as it pertains to operating independently or as a part of the Army and Marine units under one Joint Task Force. After the acquittal of Rodney King, rioting broke out in the streets of Los Angeles. The Governor decided to mobilize the California National Guard (CANG) to support both the Los Angeles Police Department (LAPD) and the Los Angeles Sheriff's Department (LASD). Approximately 6,000 CANG troops reported to Armories and, within the first 24 hours, over 1,000 CANG troops were deployed awaiting missions from the LASD and LAPD, while the remainder awaited the arrival of equipment and ammunition. "The National Guard hit the street . . .the fires and crimes quickly ended. This was before the federal troops arrived. . .the fires and crimes ended, . . .they dropped to about 40 percent of normal."<sup>29</sup> "While this situation was evolving, hundreds of California Highway Patrol officers—who, according to the mutual aid concept, should have been deployed long before the CANG—sat in a staging area in Los

Alamitos with nothing to do.”<sup>30</sup> During the initial days of the employment of the CANG, virtually all of the mission taskings were accepted and completed with approximately 1,000 CANG personnel available as a reserve force. Despite the positive support the National Guard was providing to control the violence, a perception at the political level existed that additional force was needed.

“Even as elected officials were appealing publicly for more soldiers, the CANG was pushing soldiers out to support LA area law enforcement agencies more quickly than the police could absorb them.”<sup>31</sup> The Los Angeles Mayor and Governor requested additional troops partly due to the media dramatization of the situation as well as the concern that the CANG was delayed because of equipment and ammunition issues. Despite the fact that the National Guard forces responded quickly, the fact that the CANG as well as the California Highway Patrol had personnel on standby, and the fact that fires and crime had dramatically declined, the Governor requested federal troops to control the disturbances. “...Governor Wilson advised President Bush that the domestic violence and disorder had exceeded the capabilities of available law enforcement resources, including the National Guard.”<sup>32</sup> “As required by statute, the President issued a Proclamation commanding all persons engaged in acts of violence and disorder to cease and desist therefrom and to disperse and retire peaceably forthwith.”<sup>33</sup> At this point, the President directed the federalization of the National Guard and created the Joint Task Force, a federalized component which served as the command and control element. After the President authorized federal troops to control the civil disturbance, the restrictions under the PCA no longer applied.

Many reports debated whether or not the JTF commander was accurately interpreting the exception to the PCA under the Insurrection Act. After the military forces, to include the CANG, were federalized, the JTF commander accepted only 10% of the incoming requested missions. “According to Major General Marvin Covault, the JTF commander, ‘It was not the military’s mission to solve Los Angeles’s crime problem, nor were we trained to do so.’”<sup>34</sup> A lengthy and formal approval of missions went into effect as well as a centralized response, which included a requirement of an officer or a platoon on the ground for all assigned missions. Prior to the federalization of the military, the National Guard responded to requests by deploying teams or squads specifically tailored to the mission requirement. After the federalization of the military, each request for assistance was reviewed by the staff judge advocate, the operations officer, and the JTF commander.

...the Report by the Special Advisor concluded that the JTF commander was ‘apparently unfamiliar with the President’s Proclamation and erroneously

believed that federal troops were prohibited from becoming involved in law enforcement functions under the federal Posse Comitatus Act'<sup>35</sup>

According to other studies, as well as interviews with the JTF leadership, a misinterpretation of the PCA was not the issue.

The problem was when they got there, law and order had *already* been restored! So they were stuck over here in the so-called 'preserve law and order' status. We said let the cops do their own dirty work; that's one we're not going to do for them in the future. We did it once and the California Guard will never do that again.<sup>36</sup>

Essentially, this case study shows that the CANG adequately augmented civilian law enforcement in quelling the LA Riots. After the CANG was placed in federal status, their mission taskings to support law enforcement were heavily screened and, therefore, significantly decreased. Even with the authority to perform law enforcement missions, the JTF Commander was not eager to involve the federalized military in civilian law enforcement. Additionally, some confusion may have existed in the interpretation of the PCA even though it did not apply.

#### Natural Disasters

Besides protecting our homeland in times of crises, the military is often called to manage the crises and consequences of natural disaster. Hurricanes Andrew and Katrina demonstrate the relationships between the federalized Army and National Guard in the performance of law enforcement as it pertains to the PCA. Hurricane Andrew made evident that the active-duty military police were restricted in performing active law enforcement functions when employed in support of a domestic disaster. On August 24, 1992, Hurricane Andrew struck near Homestead, Florida and subsequently struck Morgan City, Louisiana on August 26, 1992. "In anticipation of the approaching hurricane, on August 23, 1992, the Florida Governor activated over 1,500 members of the Florida National Guard Army and Air units to support response and recovery tasks."<sup>37</sup> The devastation was much more significant in Florida than Louisiana as it hit the densely populated areas in southern Florida. However, in both states, the National Guard played a significant role in assisting law enforcement during the relief effort. Within a week, President Bush declared both areas federal disaster areas and provided assistance under the Stafford Act.<sup>38</sup> Of significant note, under the Stafford Act<sup>39</sup>, the federalized Army is not authorized to participate in active law enforcement activities. During Hurricane Andrew, the National Guard military police were not federalized and, therefore, were able to assist civilian law enforcement. In contrast, the active duty military police were very restricted in mission performance.

By 27 August 1992, Joint Task Force Andrew was established, and even with this new structure, the Florida National Guard military police were never federalized. Essentially, when it came to law enforcement, the active duty military police could only perform tasks that passed the "military necessity" test. The JTF Commander's intent was clear as LTG Ebbesen stated, "DO NOT engage in law enforcement actions or operations without approval of CG, JTFA."<sup>40</sup>

Active component military police provided traffic control (but only where such activity was in furtherance of military purpose, e.g., facilitating the movement of military convoy traffic), area and route reconnaissance, security of military equipment and supplies, force protection, discipline, and VIP security.<sup>41</sup>

In contrast, Army National Guard Soldiers augmented civilian law enforcement in civilian traffic control, area security in support of the disaster area, and other law enforcement missions.

Major General David Meade, the 10<sup>th</sup> Mountain Division Commander, who had deployed active military police under his charge, commented on the restrictions placed under the PCA.

The Military Police (active duty) are hampered. There are all kinds of reasons for this of course. A prime one is that we don't want to officially want to be responsible for the safety, health and welfare of a large indigenous population. Of course, we often end up being responsible in a defacto/darned if you do and darned if you don't kind of way. This puts a lot of heat and pressure on the Command overall, but, especially, on the Captains, and Lts and Sergeants who are the leaders/commanders on the ground where that rubber meets the road.<sup>42</sup>

In the state of Florida, the National Guard military police units were credited for providing efficient, effective, and necessary law enforcement support. In contrast, the State of Louisiana, utilized non-law enforcement National Guard personnel. "During Hurricane Andrew in Louisiana, state National Guard Field Artillery units, rather than Military Police units, were activated and stationed in New Orleans to provide forces to combat potential civil disturbances and augment local law enforcement agencies."<sup>43</sup> The unavailability of low density/high demand specialties such as military police in Louisiana, and subsequent use of field artillery, proved counterproductive in responding to this homeland disaster. In Florida, however, the split role between the active and National Guard military police in performing their differing law enforcement tasks functioned well. The Florida National Guard adequately augmented law enforcement and the legal balance between the Army's response, both federal and state, was preserved. However, it is doubtful that the average citizen would know the difference between a National Guard Military Police Soldier and an active-duty Military Police Soldier in the performance of law enforcement and security duties. All military police are trained in the protection of individual rights, and therefore, should not be restricted under the PCA when employed to natural disasters simply due to the component status. Because of the flexibility to

work under state or federal control and the ability to respond to disasters within the first few hours and days while national resources are alerted and deployed, if properly organized and structured, the National Guard is best suited to respond to disasters.

Most disasters, natural or man-made, can be effectively handled by local and state assets.

Catastrophic events, however, require an immediate large-scale response.

Only the federal government can build a national response system, the kind needed in a catastrophic disaster to mobilize the resources of the nation in the face of a disaster that immediately overwhelms local leaders and puts tens-of-thousands of lives at risk.<sup>44</sup>

The National Guard is the logical military force for a national response capability, since it has the legal authority and is embedded in American communities. Even though the response to Hurricane Katrina is still being studied and debated, early indications are that a stand-alone, rapidly deployable homeland security force may have mitigated loss of life. Because of the severity of Hurricane Katrina, the local and state authorities became quickly overwhelmed or were not available due to their own personal devastation. In addition, state governors were negatively affected by the availability of the National Guard, since some units were deployed overseas fighting the War on Terror. The overseas deployment impacted both personnel and equipment to the extent that not only were some entire units deployed, but some units had returned and were required to leave their assigned equipment overseas.

...there is anecdotal evidence that, particularly for the National Guard, the issue centered more upon the availability of equipment rather than personnel. ...As a result, for example, it has been reported that National Guard units responding to Katrina did not have adequate numbers of tactical radios or High Mobility Multi-Wheeled Vehicles (HMMWVs) adapted for high water operations because this equipment was in Iraq.<sup>45</sup>

The Governor of Louisiana declared a state of emergency on August 26, 2005, and the Governor of Mississippi declared a state of emergency one day later. "On Monday, August 29, after Katrina made landfall, President Bush issued a federal declaration of emergency, and on Tuesday, August 30, JTF-Katrina was officially activated."<sup>46</sup> During Hurricane Katrina, National Guard personnel from various states were activated under each individual state's active duty status and were under the operational control of each affected state governor. Retroactively, however, all National Guard members operated under the Title 32 status. "Interstate agreements allowed National Guard personnel from states outside the hurricane affected area to deploy to Louisiana and Mississippi and assist with disaster relief."<sup>47</sup> Because the National Guard units were not federalized, National Guard personnel were able to perform law enforcement and security functions. Despite the favorable National Guard support, additional

manpower assets were needed to control looting, prevent and respond to serious crime, conduct search and rescue, provide traffic control, and assist in evacuation. A stand-alone and rapidly deployable homeland security force could have lessened immediate manpower needs. Additionally, in order for federalized troops to perform active law enforcement as an exception to the PCA, the President would have had to declare the area an insurrection—a move that could be predictably viewed as a politically unpopular decision. Legally, during Hurricane Katrina, federalized troops were prohibited from performing active law enforcement duties during this extraordinary catastrophic event. Because Hurricane Katrina is still being studied, the impact of the PCA's restrictions for federalized troops is still being analyzed as well as the reorganization of the National Guard to better respond to catastrophic events.

#### Change of the Legal Restrictions under the PCA

The traditional approach in the response of the military with the current application of the PCA is characterized as a reactive and passive way of employing the Army in domestic emergencies. Since 9/11 and the recent catastrophic natural disaster, Hurricane Katrina, a debate has been renewed concerning the expansion of the Army's role in law enforcement beyond the restrictions imposed by the PCA and the restructuring of the Army for this role. In a speech delivered in New Orleans, ". . . Bush called for a vastly expanded military role in disaster relief, including 'reconsideration' of a century-old law banning the active-duty military from law-enforcement duties."<sup>48</sup> General Ralph E. Eberhart, Commander of Northern Command in 2002, favored changing existing law to give the military greater domestic authority when responding to crisis. With no specific changes in mind, he stated, "We should always be reviewing things like Posse Comitatus and other laws if we think it ties our hands in protecting the American people."<sup>49</sup> With the current asymmetric and transnational threat now compounded by potential catastrophic natural events, a renewed debate concerning the repeal or amendment of the PCA has emerged. Those that seek to repeal or amend the PCA view the statute as a legal impediment to response efforts regarding domestic crises. For instance, LTC Donald J. Currier, in his article, "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" states,

The PCA interferes with the nation's ability to defend itself against such a nimble asymmetric enemy. This blurring of distinctions among enemy combatants, criminals, terrorists, and other nonstate actors increases the onerous task of distinguishing lawful from unlawful actions under the PCA.<sup>50</sup>



In his article, LTC Currier's argues that the Secretary of Defense should seek an immediate repeal of the PCA in order to eliminate a legal obstacle which could interfere with our flexibility and adaptability when dealing with an asymmetric enemy or a catastrophic event.

Legally, a harmonious relationship exists between the people and the military in supporting the current restrictions under the PCA. When military forces are employed to actively augment civilian law enforcement as an exception to the PCA, the units employed are often non-military police units and are untrained to function in executing the law with respect to constitutional rights. Because units are untrained and unskilled in law enforcement but are often employed in domestic emergencies, local officials and military commanders are reluctant to assign law enforcement tasks to the active component. Active-Duty, Reserve, and National Guard military police units are trained in the protection of individual rights. Under current law, active-duty and reserve military police units are restricted from active law enforcement when employed during natural disasters while National Guard military police units, under Title 32 status, can perform law enforcement functions. This restriction is counterproductive in mission accomplishment and lessens the available capabilities to civilian local, state, and federal law enforcement jurisdictions. Besides natural disasters, military police in the performance of their day-to-day duties are legally restricted under the PCA to actively assist local law enforcement or community members in police duties outside of the military installation. At many military installations, jurisdictional boundaries are indistinct and additional small pockets of sub-installations exist within civilian communities. When patrolling to or from a distant military community, a military policeman may observe suspicious criminal activity but will generally be barred from actively responding to the activity because of the PCA.

Today, clear-cut separations between domestic and foreign threats are no longer present. The restrictions under the PCA create difficulties for federalized Army military police. Since the Army's assistance to civil authorities in the performance of homeland security is a core priority and mission, a strategy that effectively achieves the desired end state with minimal risk to this vital U.S. interest is essential. Besides the PCA, with the increased emphasis on the military's role in homeland security, the QDR indicated that the military should consider changes in force structure in order to better defend and secure the United States.

#### Change in Force Structure

Currently the Army responds to domestic emergencies with its existing capabilities, which are designed to fight our nation's wars.

The nature of the homeland security threat has not in the past made this a core or priority mission. The Army has also been reluctant to single out specific capabilities for homeland defense, or any other nonwarfighting activity, for fear

that this would suggest that they did not need what they currently had for the warfighting contingencies. As a result, the Army has preferred living with the periodic strains of competing demands at home and abroad.<sup>51</sup>

The traditional approach has the support of the Secretary of Defense, Donald H. Rumsfeld.

“Although Secretary Rumsfeld has shown no reluctance to push for transformation in structure and operations, however, when it comes to homeland security, he has sided with the uniformed services to preserve their insulation from domestic operations.”<sup>52</sup> Essentially, filling gaps is the current method by which the Army employs forces to protect the homeland. Risk exists in that forces may not be readily available for warfighting or a rapid response to domestic homeland contingencies. Since an increased emphasis exists in the Army’s role to assist civil authorities, risk should be mitigated when analyzing strategies for a balance in the areas of acceptability, feasibility, and suitability. Our current U.S. strategy of a traditional approach in the Army’s support to homeland security is not balanced; therefore, additional risk is assumed. This risk is extremely difficult to measure because each individual local and state jurisdiction has unique capabilities and resources which may need to be augmented and supported by the Army in the event of a natural or man-made disaster. Without a dedicated set of capabilities for homeland security, the overall objective (suitability)—the proactive security of our homeland—is at a greater risk. In order to reduce risk, a change in force structure must be considered.

Deploying the military faster to meet domestic security needs will require the Army to plan and budget for a dedicated set of homeland security force structure assets. Emphasis should be placed on low density, high demand (LD/HD) assets such as engineering, military police, communication, logistic, and chemical and biological detection specialties.

According to Secretary Rumsfeld, ‘after September 11, we found that our responsibilities in homeland defense exacerbated these shortages in key (LD/HD) assets. No U.S. president should have to choose between protecting citizens at home and U.S. interests and forces overseas. We must be able to do both’.<sup>53</sup>

The QDR allows the Army to experiment and recommend which capabilities require force structure change but is currently without clear guidance with regard to the Army’s specified tasks for homeland security. The 2004 RAND Arroyo Center report, however, provides more specific force structure changes for the Army leadership to consider. Table 1 below, taken from this study, provides five courses of action which illustrate rapid response capabilities by dedicating an available pool of Army assets that could potentially be available to civil authorities.

| Possibility   | Illustrative Response   |
|---|---|
| National Guard inadequately prepared, because of focus on conventional wars   | Improve National Guard's HLS capabilities by providing DOD Title 32 funding and improved sharing of state assets                                      |
| Active-duty component (AC) is not available quickly enough or adequately trained to respond to large-scale domestic emergencies   | Dedicate brigade for rapid reaction, rotating between AC and National Guard (3,600 soldiers)  |
| Law enforcement combined with available Army counterterrorism capabilities cannot meet demands of future terrorist attacks  | Create rapidly deployable and dedicated AC force for combating terrorism (6,200 soldiers)   |
| AC cannot respond adequately to large-scale domestic emergencies, because significant numbers are deployed overseas   | Give National Guard primary responsibility for HLS activities by creating dedicated rapid-response regional civil support battalions (8,900 soldiers) |
| Units critical for HLS in U.S. Army Reserve (USAR) are not available because they are deployed overseas, not ready quickly enough, and prohibited by statute from conducting all missions | Dedicate pool of USAR units to exclusive HLS mission (7,560 soldiers)   |

TABLE 1. HLS POSSIBILITIES AND ILLUSTRATIVE ARMY RESPONSES<sup>54</sup>

This study provides an overview of possible courses of action to be further developed if the Army leadership decides to commit dedicated resources to homeland security. Three out of the five options illustrate an Army response requiring an adjustment or change in National Guard structure or capabilities. The restructuring of the National Guard is often at the center of the debate in discussions of how the Army can reorganize itself to better protect the homeland.

Restructuring the National Guard, with emphasis on support functions such as logistics, communications, military police, and a shift in its combat role to the Active Component or Army Reserve, is often argued as a viable option in meeting the overall national objective in securing the homeland with a rapid and sufficient force. A dedicated set of capabilities with full legal authority under the PCA would be available if a modification in force structure took place within the National Guard. National Guard units could be structured with emphasis on low density/high demand specialties and dedicated to homeland security. Since the National Guard historically, is best connected to serve local and state communities, this force is well suited as a dedicated homeland security asset. The National Guard, operating under its Title 32 status, is not subject to the PCA; therefore, a statutory change for this component is not necessary if it remains in state status. To better protect our vital, national interest in securing the homeland, however, both an amendment to the PCA and a change in force structure must occur.

### Policy Recommendations

Realistically, there are two viable options available to accomplish the vision set forth in the NSS, NMS, and *National Strategy for Homeland Security*. Either the status quo can be maintained with attendant risks or the PCA can be modified along with Army force structure in order to deal more effectively with an increased Army role in domestic emergencies. A dedicated and trained rapid-reaction capability should be planned and budgeted to actively support civil authorities when a state or federal agency is disrupted beyond its capacity. This force should be highly trained to effect a speedy restoration of order until civilian authorities are capable of maintaining operations independently. This rapid-response force, when not responding to a natural or man-made disaster, should be actively engaged operationally or exercised in local, state, or federal government contingency drills. Operationally, this force could be employed randomly at the nation's borders and at critical infrastructure to augment civilian authorities. This random saturation of forces would keep an element of surprise present to a potential adversary.

All law enforcement tools should be fused in operating procedures in order to blend and create a cohesive domestic security strategy. The National Guard should provide a dedicated force, restructured with low density/high demand specialties. Its non-military police low density/high demand personnel should be cross-trained to possess a secondary specialty of military police thus enabling employed personnel to most effectively respond to disturbances and protect citizens' rights in the performance of assigned duties. The PCA should be amended to make provisions to allow Active Component and Reserve Component military police personnel to more actively assist civilian law enforcement personnel in response to domestic emergencies. This proposed adjustment with the Posse Comitatus will create the proper balance and a more cohesive state and federal response while still preserving individual civil liberties, and provide for a more stable homeland security strategy.

### Endnotes

<sup>1</sup>In President George W. Bush's *The National Security Strategy of the United States of America*, on pages 29-30, President Bush emphasizes the military's highest priority as being the defense of the United States. President Bush also states that the broad portfolio of military capabilities must include the ability to defend the homeland. George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, 17 September 2002), 29-30.

<sup>2</sup>In Secretary of Defense, Donald H. Rumsfeld's *Quadrennial Defense Review Report* on pages 18-19, the SECDEF emphasizes that the highest priority of the U.S. military is to defend the Nation from all enemies. He also states that preparing forces for homeland security may

require changes in force structure and organization. Donald H. Rumsfeld, *Quadrennial Defense Review Report* (Washington, D.C.: n.p., 30 September 2001, 18-19.

<sup>3</sup>The *National Military Strategy of the United States of America* establishes homeland security as the first priority of the Nation on page 2. Richard B. Myers, *National Military Strategy of the United States of America* (Washington, D.C.: n.p., 2004), 2.

<sup>4</sup>The *National Strategy for Homeland Security* on page 13 states that the Department of Defense contributes to homeland security through its military missions overseas, homeland defense, and support to civil authorities. Furthermore, on page 48, it suggests a review of authority for military assistance in domestic security. It states that the threat of catastrophic terrorism requires a thorough review of laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how. George W. Bush, *National Strategy for Homeland Security* (Washington, D.C.: The White House, 16 July 2002), 13, 48.

<sup>5</sup>Steven J. Tomisek, "Homeland Security: The New Role for Defense," *Strategic Forum*, February 2002; available from <http://www.ndu.edu/inss/strforum/SF189/sf189.htm>; Internet; accessed 16 September 2005.

<sup>6</sup>*Ibid.*

<sup>7</sup>The Posse Comitatus Act is contained in U.S. Code, Title 18, Sec 1385, dated 1875. Today it states, whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

<sup>8</sup>U.S. Northern Command (NORTHCOM) is the military's largest unified command reorganization since World War II in an effort to better combat terrorism. Prior to NORTHCOM's establishment, homeland defense efforts had been coordinated among four different combatant commanders. Christopher Bolkcom, Lloyd DeSerisy, and Lawrence Kapp, "Homeland Security: Establishment and Implementation of Northern Command," *CRS Report for Congress*, (May 14, 2003); available from <http://www.fus.org/man/crs/rs21322.pdf>; Internet; accessed 11 January 2006.

<sup>9</sup>Jennifer Elsea, "The Posse Comitatus Act and Related Matters: A Sketch," *CRS Report for Congress* (June 6, 2005): 1; available from <http://www.fas.org/sgp/crs/natsec/RS20590.pdf>; Internet; accessed 16 September 2005.

<sup>10</sup>Eugene P. Visco, "More than You ever Wanted to Know about Posse Comitatus," (2001); quoted in John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," February 2002,3; available from <http://www.homelandsecurity.org/journal/articles/brinkerhoffpossecomitatus.htm>; Internet; accessed 4 October 2005.

<sup>11</sup>Robert Kelly, *The Shaping of the American Past, Volume 1-to 1877* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1982), 273.

<sup>12</sup>Bonnie Baker, "The Origins of the Posse Comitatus," *Air & Space Power Chronicles*, 1 November 1999; available from <http://www.airpower.maxwell.af.mil/airchronicles/cc/bakerl.html>; Internet; accessed 4 October 2005.

<sup>13</sup>William A. Stofft et. Al., *Army Historical Series: American Military History* (Washington, D.C.: U.S. Government Printing Office, 1989), 284.

<sup>14</sup>John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security" Analytic Services Inc. (1999-2002), 3; available from <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm>; Internet; accessed 11 January 2006.

<sup>15</sup>Robert Kelley, *The Shaping of the American Past, Volume 2-1865 to the Present* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1982), 378.

<sup>16</sup>J. Keppler, "Culver Pictures," in *The Shaping of the American Past, Volume 2-1865 to Present* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1982), 378.

<sup>17</sup>Brinkerhoff, 2.

<sup>18</sup>H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, (27 MIL. L. REW. 85, 1960), 92; quoted in "Washington University Law Quarterly," Volume 75, no. 2 (Summer 1997): p. 3; available from <http://law.wustl.edu/WULQ/75-2/752-10.html>; Internet; accessed 23 September 2005.

<sup>19</sup>*Domestic Operational Law (DOPLAW)* Handbook for Judge Advocates, Volume 1 (Charlottesville, VA: Center for Law and Military Operations, 2005), 17; available from <http://www.jagcnet.army.mil/JAGCNETInternet/homepages/AC/CLAMO-Public.nsf/0/a693f8e3dc/bd33585256139006f2f9d?opendocument>; Internet; accessed 23 September 2005.

<sup>20</sup>*Ibid.*, 17.

<sup>21</sup>Executive Order (EO)12333, *United States Intelligence Activities* (n.p.:n.p., 1981); quoted in David G. Bolgiano, J.D., "Military Support of Domestic Law Enforcement Operations, Working Within Posse Comitatus," *Legal Digest* 70(December 2001), 21; available from <http://www.fbi.gov/publications/leb/2001/december2001/dec01p16.htm>; Internet: accessed 16 September 2005.

<sup>22</sup>U.S. Department of Defense, Dir. 3025.12, *Military Assistance for Civil Disturbances (MACDIS)* (4 Feb 94); quoted in *Domestic Operational Law (DOPLAN)*, 21; available from <http://www.dtic.mil/whs/directives/corres/html/302512.htm>; Internet; accessed 16 September 2005.

<sup>23</sup>*Bolgiano*, 18.

<sup>24</sup>*Ibid.*

<sup>25</sup>*Hayes v Hawes*, 921 F. 2d 100 (7<sup>th</sup> Cir 1990); quoted in *Bolgiano*, 18.

<sup>26</sup>Kahn, *supra*, *United States v. Hartley*, 796 F. 2d 112, 115 (5<sup>th</sup> Cir. 1986); quoted in *Domestic Operational Law (DOPLAN)*, 23.

<sup>27</sup>*United States v. Kahn*, 35F. 3d 426 (9<sup>th</sup> Cir. 1994); quoted in *Bolgiano*

<sup>28</sup>Fred C. Ikle, "Defending the U.S. Homeland, Strategic and Legal Issues for DoD and the Armed Services" (Washington, D.C.: CSIS Homeland Defense Working Group, January 1999),

17; available from <http://www.csis.org/burke/textnew.pdf>; Internet; accessed 16 September 2005.

<sup>29</sup>MG James Delk, "MOUT: A Domestic Case Study-The 1992 Los Angeles Riots, " *RAND Organizational CF148* (November 1995): 104 available from [http://www.rand.org/pubs/conf\\_proceedings/cf148/cf148.appd.pdf](http://www.rand.org/pubs/conf_proceedings/cf148/cf148.appd.pdf); Internet; accessed 3 September 2005.

<sup>30</sup>LTC Christopher M. Schnaubelt, "The 1992 Los Angeles Riots, Lessons in Command and Control from the Los Angeles Riots," *The California State Military Museum*, 9, available from <http://www.militarymuseum.org/LARiotsI.html>; Internet; accessed 23 September 2005.

<sup>31</sup>*Ibid.*, 10.

<sup>32</sup> "Civil Disturbance Operations-LA Riots," *After Action Report for Joint Task Force-Los Angeles*, 9 June 1992, available from CLAMO; accessed 7 November 2005.

<sup>33</sup>*Ibid.*

<sup>34</sup>Schnaubelt, 12.

<sup>35</sup> *The City in Crises*, supra note 2; quoted in an attachment in "Civil Disturbance Operations-LA Riots", *After Action Report for Joint Task Force –Los Angeles*, 9 June 1992.

<sup>36</sup>Delk, 115.

<sup>37</sup>"State Mission Demands in Perspective," available from <http://www.rand.org/Publications/MR/MR557/MR557.Chap5.pdf>; accessed 2 November 2005, 39-40.

<sup>38</sup>The Stafford Act authorizes the President to respond to disaster relief and emergency assistance under 42 U.S.C. 5121 and Executive Order 12673, 23 March 1989. DoD Directive 3025, and AR 500-60 designate the Army's response.

<sup>39</sup>DOD Directive 30.2.1 (DRAFT) provided the guidance for DOD elements to comply with the provisions of the Stafford Act. Some important parts of the DOD directive are: "...Active Component military is not used for law enforcement." Joint Task Force Andrew After Action Report Overview Executive Summary," (database on-line); provided from Center for Army Lessons Learned (CALL); U.S. Army Combined Army Command; accessed 23 Sept 05, 1.

<sup>40</sup>*Ibid.*, 2.

<sup>41</sup>*Ibid.*, 8.

<sup>42</sup>MG David Meade, e-mail message to author, 31 October 2005.

<sup>43</sup> "State Mission Demands in Perspective," 36.

<sup>44</sup>James Carafano, "Improving the National Response to Catastrophic Disaster," *The Heritage Foundation*, 15 September 2005; available from <http://www.heritage.org/Research/HomelandDefense/tst091505a.cfm>; Internet; accessed 19 January 2006.

<sup>45</sup>CRS Report for Congress, Order Code RL33095, *Hurricane Katrina: DOD Disaster Response* (Washington, D.C.: Congressional Research Service-The Library of Congress, September 19, 2005), 15; available from <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>; Internet; accessed 5 October 2005.

<sup>46</sup>Ibid, 5.

<sup>47</sup>Ibid, 7. "The response from other states under such agreements has been unprecedented. As of September 7, 2005, National Guard personnel from all fifty states, Puerto Rico, and the U.S. Virgin Islands had joined in the relief effort. Some interstate agreements are negotiated state to state.... The EMAC website is (<http://www.emacweb.org>). "

<sup>48</sup>Spencer Ackerman, "The End of Posse Comitatus?" *The New Republic Online*, 24 October 2005; available from <http://www.tnr.com/doc.mhtml?i=20051031&s=ackerman103105>; Internet; accessed 16 November 2005.

<sup>49</sup>Eric Schmitt, "Wider Military Role in US is Urged," *Why War?*, 17 July 2002; available from <http://www.why-war.com/news/2002/07/17/widermil.html>; Internet; accessed 18 November 2005.

<sup>50</sup>Donald J. Currier, "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" *Strategic Studies Institute*, September 2003; available from [www.strategicstudiesinstitute.army.mil/pdffiles/PUB 249.pdf](http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB%20249.pdf); Internet accessed 2 November 2005.

<sup>51</sup>Lynn E. Davis, "Defining the Army's Homeland Security Needs," *RAND, The U.S. Army and the New National Security Strategy*, 2003; available from <http://www.rand.org/publications/MR/MR1657/mr1657.ch4.pdf>; Internet; accessed 2 November 2005.

<sup>52</sup>Karen Guttieri, "Homeland Security and US Civil-Military Relations," *Strategic Insight*, 1 August 2003; available from <http://www.ccc.wps.navy.mil/si/aug03/homeland.asp>; Internet; accessed 2 November 2005.

<sup>53</sup>Davis, 64.

<sup>54</sup>"An Army Transforming while at War" *RAND ARROYO Center, Annual Report 2004*; available from <http://www.rand.org/ard/ar-7099.pdf>; Internet; accessed 2 November 2005.